

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

LEVI, INC., d/b/a AMERICAN DIGITAL
SYSTEMS

Employer¹

and

Case 14-RC-12561

LOCAL ONE, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

The Employer, Levi, Inc., d/b/a American Digital Systems, is engaged in the residential and commercial installation and service of satellite dishes produced by Dish Network, a separate corporate entity. The Petitioner, Local One, International Brotherhood of Electrical Workers, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, which was amended at hearing, seeking to represent the Employer's full-time and regular part-time field service technicians/specialists, quality assurance specialists, and field service managers (FSMs). A hearing officer of the Board held a hearing and the parties filed briefs.

The supervisory status of the four FSMs is the only issue to be decided. The Petitioner seeks to include these individuals and argues they are employees under the Act. The Employer argues these four individuals are supervisors under Section 2(11) of the Act, and, therefore, should be excluded from the unit. I have considered the evidence and the arguments presented by the parties on this issue, and I find that FSMs

¹ The Employer's name appears as amended at hearing.

are not supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall include the FSMs in the unit. With respect to the two FSMs who are not currently employed, Jordan Dreeste and Ryan Hurtgen, I take administrative notice that prior to the hearing on this matter, on April 7, 2005, the Petitioner filed an unfair labor practice charge against the Employer in Case 14-CA-28244 alleging that these two individuals were terminated in violation of Section 8(a)(1) and (3) of the Act. Accordingly, I shall permit Jordan Dreeste and Ryan Hurtgen to vote subject to the Board's challenged ballot procedures. *Texas Meat Packers, Inc.*, 130 NLRB 279 (1961); *The Tetrad Co., Inc.*, 122 NLRB 203, 204 (1958).

I. OVERVIEW OF OPERATIONS

The Employer is an Oklahoma corporation with its principal offices in Tulsa, Oklahoma, and a facility in St. Louis, Missouri. The Employer's president works in the Tulsa office. The payroll and human resources departments also operate out of the Tulsa office. The general manager, who reports to the president in Tulsa, is the highest ranking individual at the St. Louis facility. The assistant general manager, warehouse manager, and the office manager at the St. Louis facility all report directly to the general manager. The FSMs at issue report directly to the assistant general manager, who did not testify, and general manager.

The Employer currently employs approximately 18 field service technicians/specialists (technicians), and 3 quality assurance (QA) specialists. The 18 technicians report to the FSMs. The QA specialists report to either the general manager or the assistant general manager. Each FSM is assigned to a particular geographic area. Five to seven technicians are assigned to each FSM, and these technicians all work in the same geographic area as their FSM. The Employer's office hours are from 7 a.m. to 8 p.m., Monday through Sunday. Technicians are expected to report by 7 a.m., and clock in by telephone at their first job by 7:15 a.m., although certain technicians

have a later start time. FSMs usually arrive at the facility between 6:30 and 7 a.m. and have a goal to being out of the office to clock in on their first job by 8:30 a.m. Both the FSMs and the technicians are required to follow the same procedures for clocking in and out on each job throughout the day.

The technicians are hourly employees who receive a base weekly wage rate of \$320, and are also eligible to receive a weekly incentive bonus. The total weekly wages of the technicians with the bonus range from \$500 to \$2,000. The FSMs are salaried and earn weekly salaries ranging from \$650 to \$800. FSMs are not eligible for the weekly incentive bonus, but are eligible for a \$100 weekly bonus if the St. Louis facility processes various installation paperwork within certain, undisclosed guidelines. The QA specialists, like the FSMs, are salaried and their weekly salaries range from \$500 to \$600. QA specialists are also not eligible for the incentive bonus. All the Employer's employees, including the FSMs, receive the same fringe benefits, including vacation, 401(k), and health insurance. FSMs, technicians, and QA specialists also all wear the same blue T-shirt with the Employer's name on it.

Technicians are primarily responsible for the installation of satellite dishes for residential customers. In performing these installations, the technicians have to establish that the residence has a "line of sight" for the satellite dish, and then must survey the residence to determine where to physically install the dish. The Employer requires technicians to take a minimum number of pictures of the installations when they are completed, including pictures of the residence, the installation, and the grounding of the wires, and to properly complete all the paperwork, including the contract between the customer and Dish Network. Technicians also handle service calls or trouble calls from customers.

The QA specialists are responsible for checking the installations that could not be performed because the residence lacked a line of sight, to determine whether the

technician made the correct decision. The QA specialists also check installations to ensure they were performed to the Employer's specifications, make sure the customers are satisfied, and check to make sure the satellite dish is working properly. QA specialists spend approximately 10 to 25 percent of their time performing residential installations and handling service calls.

There are three warehouse employees at the St. Louis facility. These employees are not included in the unit. They report directly to the warehouse manager and are primarily responsible for the equipment used in the installations, including the satellite dishes. Equipment that is not working properly or that is returned by the customer is handled by the warehouse employees. The warehouse employees are also responsible for the supplies used by the technicians in performing the installations.

FSMs are responsible for training new technicians, monitoring the technicians to ensure they are completing their job orders, and checking the pictures of the installations and paperwork to ensure the installations are being performed to the Employer's specifications. FSMs also check to see that technicians have properly filled out their inventory sheets on their supplies. FSMs communicate with the technicians throughout the day by two-way radio. In addition, FSMs investigate damage claims when a customer contends damage occurred as a result of the installation and determine if they are valid. If the damage is slight, and the technician admits to causing the damage, the FSM may recommend to the general manager that payment be made to the customer. FSMs are required to discuss all damage claims with the general manager or the assistant general manager, either of whom may conduct a follow up investigation to confirm the FSM's evaluation of the claim. If the damage is extensive, the customer must obtain three estimates for the repairs per company policy. These estimates are then handled by personnel in Tulsa. FSMs also perform commercial installations and service calls, which are a small percentage of the Employer's business. Commercial

installations are more complex because they may involve multi-story buildings, group access, working with building maintenance, and working with security personnel.

II. ANALYSIS OF SUPERVISORY STATUS OF FSMs

The test for determining supervisory status is whether the individual has the authority to engage in any 1 of the 12 criteria enumerated in Section 2(11) of the Act, uses independent judgment in the exercise of such authority, and holds the authority in the interest of the employer. *N.L.R.B. v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994). The burden of proving that an individual is a statutory supervisor is on the party alleging such status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002). Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000). "Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory status, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Job descriptions or other documents suggesting the presence of supervisory status, such as the Employer's letter of understanding, are not given controlling weight. Thus, while supervisory authority may exist even if not exercised, it must be actual, as opposed to paper, authority. *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

As the Employer asserts the FSMs are supervisors, the Employer is charged with proving their supervisory status. The Employer has not met its burden. The Employer

provides no evidence and does not contend that the FSMs can layoff or recall employees. As a result, this analysis does not include these two criteria.

A. Assignment of Work/Scheduling/Transfer

FSMs do not assign technicians using independent judgment. Dish Network assigns jobs to the Employer electronically. The Employer receives the data at its Tulsa office, and personnel in the Tulsa office, not the FSMs, run a computer program that makes the initial work assignments for each individual technician and determines the routes by geographic area. These assignments are then sent to the St. Louis facility and approved by either the general manager or the assistant general manager, and are then distributed to the technicians by computer. While the general manager testified that FSMs could modify the initial assignments to even out the work flow, such as when a technician finishes assignments and needs more orders, or if a technician is running behind schedule and needs help completing his jobs, such assignments made to equalize the technicians' workload are routine assignments not requiring the use of independent judgment. *KGW-TV*, 329 NLRB 378, 382 (1999); *Ohio Masonic Home*, 295 NLRB 390, 395 (1989). Further, the letter of understanding between the Employer and the FSMs requires that in circumstances where a technician loses work and has the opportunity to take another job, the FSM is to contact the general manager or the assistant general manager.

The record contains no specific instances of an FSM forcing a technician to take a particular assignment. One technician, presented by the Employer, testified that his FSM always asked him first before giving him an extra job; never telling him he had to accept it, though sometimes the FSM would give the job to the technician before the technician had the opportunity to get back with the FSM to officially accept the job. This same technician testified that he could and did refuse to accept a job he was asked to perform by the FSM, and "nothing" happened to him as a result.

When a technician calls in sick, the FSMs follow a “normal routing” procedure, not disclosed in the record, for calling in technicians. There are no specific instances of an FSM forcing a technician to come in or stay over and fill in for an absence. FSMs cannot authorize overtime, which authority is retained by the president in Tulsa. Calling in technicians or randomly selecting volunteers, without the ability to compel the technician to come in to work or to compel overtime, does not confer supervisory status on the FSMs. *Harborside Healthcare, Inc.*, 330 NLRB 1134, 1136 (2000).

FSMs do not assign breaks or lunches, do not schedule the technicians’ working hours, or have any authority to let a technician leave early. FSMs also do not approve vacation requests or sick leave. While technicians may hand in their sick leave or time off requests to the FSMs, the FSMs merely turn these requests over to the general manager or assistant general manager and have no authority to approve such requests on their own. If a technician requests a vacation, and the FSM believes there might be a “conflict” for that particular date, the FSM refers the matter to the general manager or assistant general manager. While one FSM testified that he can request that a technician provide a doctor’s note when submitting a sick leave request, the record reflects the Employer requires a doctor’s note and has established policies on when FSMs have to request technicians to provide a doctor’s note. The record reflects no instances of an FSM approving a leave request on his own authority, or denying any leave request.

Further, assignment power is only supervisory where the purported supervisor exercises independent judgment or discretion in making assignments based on his own assessment of an employee. Independent judgment is demonstrated by evidence that an individual has discretion to assign work of differing degrees of difficulty or desirability on the basis of his own assessment of an employee’s ability or attitude. If the assigned tasks are so routine that they do not require a purported supervisor to differentiate

between employee skill levels, the individual making the assignments will be found to be nonsupervisory. See *Patagonia Bakery Co.*, 339 NLRB 515 fn. 1, 535 (2003). Similarly, where an individual's assignment power is circumscribed by established company policy or higher authority, the individual has been held to be nonsupervisory. See *Halpak Plastics, Inc.*, 287 NLRB 700, 706 (1987).

There is no specific evidence of FSMs modifying a technician's initial assignment based on an assessment of that particular technician's skills, or that FSMs use independent judgment to select technicians for assignments. The record reflects no evidence that the trained technicians' skills differ significantly, or that it is necessary for FSMs to resolve conflicts or problems with respect to the skills or strengths of the trained technicians. The absence of such specific evidence is construed against the Employer. *Michigan Masonic Home*, supra. The assignment of work not based on the level of employee skill but on the need to get work completed on time is not indicative of the use of independent judgment. *Esco Corp.*, 298 NLRB 837, 839 (1990). Finally, there is no evidence FSMs can assign technicians tasks that are outside of the Employer's established policies or procedures, such as assigning a technician to perform commercial installations, and thus any assignment power the FSMs have is circumscribed and does not reflect the use of independent judgment. The authority to assign or reassign work, alone, without the use of independent judgment, is not indicative of supervisory authority. *KGTV*, 329 NLRB 454, 456 (1999).

With respect to transfers, FSMs cannot transfer technicians to different teams on their own authority, nor does the record reflect that their recommendations to transfer technicians are effective. The general manager testified FSMs could recommend technicians be transferred to a different team due to a personality conflict, to ensure each team has some experienced and inexperienced technicians, and mainly to ensure an equal number of technicians on each team. These transfer recommendations,

however, are not automatically approved. The general manager has denied about 20 percent of the transfer recommendations he has received. In the only record example of transfer, an FSM recommended to the general manager that a technician be transferred due to a personality conflict between the FSM and the technician. The general manager ultimately approved the recommendation and transferred the technician. The authority to effectively recommend, however, means that the recommended action is taken without any independent review or investigation by higher management, not that the recommendation was eventually followed. *Children's Farm Home*, 324 NLRB 61 (1997). The Employer did not provide the specific details surrounding the general manager's decision regarding the transfer, and has thus failed to demonstrate the decision was based solely on the FSM's recommendation without any independent review or investigation by higher management. In these circumstances, the record evidence is insufficient to establish the FSMs make effective recommendations regarding transfers. See *Ten Broeck Commons*, 320 NLRB 806, 813 (1996).

B. Responsible Direction

FSMs do not "responsibly" direct the technicians. An employee who responsibly directs with independent judgment within the meaning of Section 2(11) of the Act is one who has: (1) been delegated substantial authority to ensure a work unit achieves management's objectives and is thus "in charge"; (2) is held accountable for the work of employees in the unit; and (3) exercises significant discretion and judgment in directing his or her work unit. While the Employer presented some evidence the FSMs meet the criteria listed in the first factor, the Employer has not met its burden in establishing the FSMs meet the second and third factors of being held accountable and exercising independent judgment.

With respect to the first factor, there is some evidence the FSMs are "in charge" of the technicians on their teams. FSMs are responsible for ensuring the technicians are

performing installations in accordance with the Employer's established policies and procedures. FSMs check the technicians' installation pictures to make sure the installations are performed according to the Employer's written guidelines, such as being properly grounded. FSMs also check the contract between the customer and Dish Network to ensure it is filled out properly and contains all the appropriate signatures. If an FSM determines that an installation was not performed properly, the FSM may instruct the technician to redo the installation, or give the technician instructions on how to correct any problems with the installation. The FSMs also monitor the completion rate of the technicians, checking to see if the technician is performing at the minimum completion rate as established by the Employer. The general manager also testified that FSMs can direct senior technicians to train the trainees, though the record fails to reflect that FSMs can force a senior technician to work with a trainee.

Other factors, however, indicate FSMs are not actually "in charge" of the technicians. While the FSMs do check the work of the technicians, the quality of the technicians' work is also checked by the QA specialists who are included in the unit. The record does not reflect any difference between the inspection of the technicians' work performed by the QA specialists and that of the FSMs. Further, if the FSMs are faced with an unusual event or "challenge" while monitoring the work of the technicians, the FSMs must contact the general manager or the assistant general manager. Also, the FSMs meet daily with the general manager and/or the assistant general manager to review the FSMs' plans for the day, including any training issues, damage claim concerns, and trouble calls that have to be handled. The general manager and assistant general manager can and do change the FSMs' plans.

Assuming the FSMs are "in charge" under the first factor and they can direct the work force, they do not do so "responsibly" under the second factor as they are not held accountable for the actions of the technicians, or even of the QA specialists. There is no

specific record evidence that FSMs are held accountable for the failure of the technicians to perform proper installations. The Employer did present one warning, a probationary warning, issued to an FSM in 2002 for not performing such FSM duties as checking his technicians' installation pictures and paperwork, or inspecting the technicians' equipment and vehicles. This warning does not indicate that the technicians were not performing their jobs properly or that the FSM was being held accountable for the technicians' performance errors, but rather that the FSM was not performing his duties of checking the work of the technicians.

Another FSM testified that he was disciplined for failing to track the technicians. The record does not reflect the specific details of this discipline, or reflect exactly what the FSM failed to track. Thus, there is no record evidence that the discipline was due to the poor performance by the technicians on the FSM's team. The general manager also testified he terminated an FSM for not performing his duties. However, the record does not establish that the discharge was motivated by the performance or conduct of others, as opposed to his own performance or conduct unrelated to any obligation to give direct. Thus, the record does not establish that FSMs are held accountable for technicians not following company policies, not performing at the 80 percent completion rate required by the Employer, or for the technicians' performance mistakes. Further, the record reflects that an admitted supervisor, the assistant general manager, is responsible for the performance of the technicians on each FSM's team. Accordingly, the Employer has not met its burden of proving FSMs "responsibly" direct the technicians by being held accountable for the performance and work product of the technicians. *Michigan Masonic Home*, supra.

Not only do FSMs not "responsibly" direct the work of the technicians, but they also do not exercise independent judgment in directing the technicians. Being able to direct certain tasks, and even being held accountable for the performance of those

tasks, alone, does not establish that the FSMs exercise independent judgment in responsibly directing the work force.

While the FSMs do monitor the work of the technicians to ensure they perform installations in accordance with the Employer's policies and procedures, and instruct the technicians on the correct way to perform the installation, this responsibility does not require the exercise of independent judgment. To ensure technicians complete their job assignments, reprioritizing work to ensure customer orders are timely completed, and calling attention to particular tasks that have not been performed properly, without the authority to hire, fire, discipline, or otherwise affect the employment status of the technicians they direct, does not require the use of independent judgment. *Charles Eneu Johnson & Co.*, 67 NLRB 1234, 1236 (1946); see also *Franklin Home Health Agency*, supra at 831; *Brown & Root, Inc.*, 314 NLRB 19, 22 (1994); *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988).

The record further reflects that the trained technicians work independently and require little further instruction in performing their installations. Directing technicians to perform tasks that are routine and familiar does not require the use of independent judgment. *Evangeline of Natchitoches, Inc.*, 323 NLRB 223 (1997). There is no evidence FSMs can direct technicians to perform duties that do not conform to the Employer's rules and regulations, such as assigning technicians to perform commercial installations. Finally, directing senior technicians to work with trainees does not reflect the use of independent judgment. Even assuming FSMs could force senior technicians to train trainees, the record reflects the Employer regularly uses experienced technicians to train trainees. Therefore, following the Employer's established practice of pairing experienced technicians with inexperienced trainees is routine and does not require the use of independent judgment.

Accordingly, I conclude that any judgment used by the FSMs to modify the initial technician assignments and direct the technicians to perform their installations properly is sufficiently curtailed by the Employer's established policies and procedures, and the tasks the technicians perform are of such a routine nature that the degree of judgment used to direct such tasks falls short of the independent judgment required for supervisory status. *NLRB v. Kentucky River Community Care*, supra; *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

C. Discipline/Discharge

FSMs do not discipline technicians using independent judgment. FSMs can issue "technician improvement/counseling" forms, referred to by the general manager as "informal counseling," to technicians for "gross" or "clear" violations of the Employer's established policies, including failing to properly clock in and out on jobs or for not timely turning in the required paperwork. While the general manager testified the Employer's disciplinary policy is "progressive," with verbal warnings, written warnings, probation, and then discharge, there is no evidence that these counseling forms are an integral part of this formal disciplinary process. The record fails to establish that the counseling forms lead to more severe discipline, or that any particular reported offense will lead to any specific discipline. There is no evidence these counseling forms by themselves impact the technicians' wages or employment status. Authority to issue verbal and written warnings, or written counselings, does not confer supervisory status where they have no clear connection to more serious disciplinary action or tangible effect on the employee's job status. See *Green Acres Country Care Center*, 327 NLRB 257, 258 (1998). Further, issuing warnings to employees for flagrant violations is not indicative of supervisory status because the offenses are such obvious violations of the Employer's established rules that no independent judgment is involved in the decision. *Michigan Masonic Home*, supra at 1411 fn. 5.

While FSMs can recommend that formal discipline be issued, the record fails to establish that recommendations made by FSMs on formal discipline are accepted without any independent investigation or review by higher management officials. Therefore, the record fails to reflect that the disciplinary recommendations are effective. Except for the counseling forms, all other disciplinary actions, including verbal warnings, must be approved by human resources in Tulsa. The general manager himself testified that neither he nor the FSMs could issue any disciplinary action beyond “minor” counselings or verbal warnings without the approval of human resources. The Employer represented nine disciplinary action forms, including four probationary warnings, all of which were prepared by human resources in Tulsa. Human resources marks on the action form whether it is a verbal warning, written warning, probation or termination, and fills out the corrective action section. The general manager receives copies of all these warnings prepared by human resources and can make changes to the warnings before they are given to the technician. After the general manager reviews the warning, it is presented to the employee by the FSM, with the general manager “often” being present as a witness. There is no evidence FSMs retain copies of these disciplinary warnings, or that FSMs have access to the employees’ personnel files, which are retained in Tulsa, or even have knowledge of or consider prior warnings in making any disciplinary recommendations.

There is conflicting evidence as to whether FSMs make recommendations on discipline directly to Tulsa, or whether FSMs only contact Tulsa about disciplinary actions after being specifically instructed to do so by higher management. Only one of the FSMs testified that he could “recommend” disciplinary actions to human resources without being told to do so. The Employer presented only two disciplinary action forms signed by him, both of which were prepared by human resources in Tulsa, not him. In both cases, he had only filled out a counseling form for the infractions, but human

resources determined that formal disciplinary action was required based, in part, on prior discipline unknown to the FSM. Two other FSMs testified they did not make “recommendations” to the general manager or to human resources, but rather provided information on rule infractions to either the general manager or human resources who then instructed the FSM on what type of discipline, if any, to issue.

Regardless of whether the recommendations are made to human resources in Tulsa, or to the general manager in St. Louis, the record reflects the recommendations are not effective because they are independently reviewed by higher management. Both the general manager and the human resources department have declined to follow FSMs’ recommendations, either deciding that no discipline was necessary or that more severe discipline was needed. The general manager testified that he has refused to accept FSMs’ recommendations on discipline, deciding instead to provide further training to the technician rather than issuing a counseling form or formal discipline. The general manager also testified that he had the discretion to issue more severe discipline than that recommended by the FSMs. Human resources has also altered recommendations made by FSMs. The record also reflects one instance where an FSM reported a rule infraction to human resources and no disciplinary action was issued. The record reflects both the general manager and assistant general manager can discipline technicians without any involvement by the FSM. In those circumstances where the general manager and/or human resources does follow the disciplinary recommendations of the FSMs, the record fails to reflect what impact such recommendations have on the individuals making the decisions, or what other factors might have been relied upon in making the decisions. Therefore, the record fails to reflect that FSMs’ recommendations are “effective” within the meaning of Section 2(11) of the Act.

FSMs do not have the authority to effectively recommend probationary warnings. All three probationary warnings presented by the Employer were prepared by human

resources. One FSM testified that as to the probationary warning that he signed, he provided information to the general manager about the rule infraction and the general manager determined that a probationary warning should be issued and instructed the FSM to contact human resources to so request. The general manager also signed the probationary warning. With respect to the two probationary warnings signed by another FSM, which were both for the same employee, the FSM testified that he was instructed by the general manager on both occasions to request probationary discipline forms from human resources. There is no evidence the FSM recommended that the technician involved receive probation or any other type of disciplinary action.

There is no evidence FSMs can terminate technicians or effectively recommend termination. The general manager specifically testified that FSMs did not possess the authority to terminate on their own. The record reflects only one instance where an FSM recommended a technician's termination. The FSM testified that he recommended to the general manager that a trainee be terminated because he was afraid of walking on roofs. The general manager conducted an independent investigation, meeting with the trainee himself before "agreeing" with the FSM's recommendation. The record also reflects that the general manager himself cannot terminate employees without approval from higher management authority in Tulsa. Therefore, FSMs do not effectively recommend termination where higher management officials independently review the disciplinary action before making a decision regarding the termination of an employee. *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890, (1997); *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993).

D. Reward

The Employer contends FSMs have the authority to reward technicians by recommending they receive bonus points for performing certain types of jobs that would not ordinarily qualify for bonus points under the Employer's policies. These types of

jobs, also referred to as “nonpay” jobs, are primarily service calls on installations that are still covered under a 90-day warranty. The number of points awarded for a nonpay job is determined by the Employer’s established policies. The technician receives a monetary incentive bonus after he earns a certain number of bonus points.

The Employer provided 10 “Tech Rewards” forms, all signed by one FSM. These forms are considered “recommendations” by the FSM to the general manager for awarding bonus points to technicians. The record reflects the Employer’s policy on technician rewards changed recently requiring FSMs to provide paperwork with the recommendation reflecting proof that the technician involved did perform a nonpay job. All of the “Tech Rewards” forms provided by the Employer are signed by the general manager. The reward form also contains a signature line for the president, though this line is blank on the forms presented by the Employer. The record fails to reflect whether the president must also sign these forms.

The general manager’s testimony with respect to the authority of FSMs to reward points is contradictory and therefore inconclusive. The general manager initially testified that FSMs could reward points to technicians without his approval, but later testified that FSMs had to submit reward recommendations to him for approval. The record provides no specific instances where an FSM rewarded points to a technician without first obtaining the approval of the general manager or other higher management officials. This lack of such specific evidence is construed against the Employer. *Michigan Masonic Home, supra.*

The record reflects the general manager and the assistant general manager meet weekly with the FSMs to discuss the issue of technician rewards. FSMs make recommendations at these meetings on which technicians should be rewarded with points. The general manager and the assistant general manager both have the authority to refuse the FSMs’ reward recommendations. While the general manager testified at

one point that he “seldom” refused to approve these recommendations, he later testified that there have been “several” times when he refused to approve an FSM’s recommendations to reward points, particularly when he determined such recommendations were “frivolous.” Another Employer witness, a technician, testified that he only received half of the rewards that his FSM recommended for him, and an FSM also testified that only half of the reward recommendations he made were approved.

The payroll office in Tulsa also independently reviews the reward recommendations and, in at least one instance, refused to approve a recommendation for a reward of points signed by both the FSM and the general manager. In this instance, the payroll office independently determined that another individual had to perform additional work on the job for which the technician was going to be rewarded points. Thus, the record fails to reflect that FSMs have the authority to effectively recommend technician rewards where higher management officials independently review the circumstances regarding the recommendations before making the ultimate decision on whether to approve such rewards. *Illinois Veterans Home at Anna L.P.*, supra; *Northcrest Nursing Home*, supra.

E. Hiring

FSMs do not have the authority to hire, or to effectively recommend the hiring of employees. There is no evidence of an FSM hiring an employee. The general manager testified that if an FSM is present when an applicant comes in, the FSM can “screen” the “application” to make sure the application is complete, and that this is the extent of the FSM’s role in the hiring process. The general manager specifically testified that FSMs are “not substantially” involved in the hiring process, and further testified he did not consider the FSMs’ “screening” of applications to be part of the actual interview process. There is no evidence of FSMs participating in job interviews. Even if the FSMs were

screening the applicants themselves, and not merely their applications, the limited ability to screen applicants, check references, and even to conduct initial interviews is not sufficient to establish the authority to hire, or to effectively recommend the hire, of employees. *The Door*, 297 NLRB 601, 602 (1990); see also *L. Suzio Concrete Co.*, 325 NLRB 392, 397-398 (1998).

The general manager testified that three of the FSMs have recommended that certain employees be hired, and the general manager did ultimately hire these individuals. However, one of the FSMs, an Employer witness, testified that while he recommended that someone be hired, he did not believe the individual was hired and the Employer presented no evidence that the individual was ultimately hired. With respect to the applicants who were hired, there is no record evidence on what, if any, weight is given to recommendations made by the FSMs in making the hiring decision. The record fails to reflect whether the general manager conducted an interview of the applicants, or what other factors may have affected the decision to hire the applicants. In one of these instances, the applicant also had separate conversations with the Employer's president prior to being hired. Thus, the record evidence fails to establish any FSM recommendations for hire were "effective" within the meaning of Section 2(11) of the Act.

F. Promotion/Evaluation

The Employer also contends the FSMs are supervisors because they provide training for technician trainees, fill out evaluations at the end of the training period, and can recommend the trainee be "promoted" to technician. The FSMs' role in the training and evaluation of a trainee's skills is not sufficient to confer supervisory status on the FSMs. The Employer regularly provides 80 hours of training for a technician trainee. The FSMs or a senior technician take the trainee on installation jobs to instruct them on the basic skills of how to install the satellite dishes. The Employer has a 4-page

checklist which contains the standard tasks that a trainee should be able to perform. This checklist includes such specific tasks as safe vehicle driving, antenna installation, cable installation, and wire grounding. The FSM, or the senior technician, and the trainee initial each task that the trainee completes.

Once the trainee has completed all the required tasks on the checklist, the trainee is automatically “promoted” to technician. This promotion is designated by an Employer Action Form generated by the payroll office in Tulsa. This Employer Action Form is signed by the employee and the FSM, and the form contains signature lines for the general manager, president/vp operations, human resources, and payroll. The trainee does not receive a wage increase upon becoming a technician, but does become eligible to earn bonus points toward an incentive bonus.

The Employer presented five checklists completed by FSMs, and all but one also included a separate page entitled “FSM Evaluation of FSS Trainee.” On this form, the FSM can either check that the trainee is ready for independent work assignments, needs additional training days, or is not ready to perform work independently. The form contains a space for FSM comments and recommendations, but none of the checklists provided by the Employer included any comments or recommendations. In all of the checklists provided by the Employer, the FSM checked that the trainee was qualified for independent work. The Employer provided no examples of evaluation forms which were checked as either needing additional training or not being qualified. One of the FSMs testified without contradiction that when a trainee has not completed all the training and is not ready or qualified to work independently, the FSM does not complete the checklist or fill out the evaluation section, but brings the matter to the attention of the general manager or assistant general manager.

The general manager testified that in the last 4 months prior to the hearing, two trainees were “pulled out of production” and given more training; and two more were not

pulled out of training, but were given some type of “refocused” training. The record fails to reflect that any of these trainees were pulled out of production or given more training solely on the basis of an FSM’s recommendation. With respect to the two trainees who were pulled out of production, the general manager testified “we” pulled the trainees out because they had several problems. The general manager did not give specific details of what the problems were, nor who “we” referred to. The record reflects that in one instance where an FSM recommended to the general manager that a trainee be given more training, the general manager also met with the trainee and had “plenty” of discussion with the trainee. The record fails to reflect specific details of the two trainees who were not actually pulled out of production but remained performing installations with “refocused” training. At one point in his testimony, the general manager admitted that he and the FSMs “might collaborate as a team” when deciding whether a trainee needs additional training. The technician who testified, the Employer’s witness, stated that senior technicians were often used to train the trainees, and that he trained 15 trainees, approximately 8 of whom he believed were not qualified to work independently. The technician not only advised his FSM that the 8 employees were not qualified, but also met separately with both the general manager and the assistant general manager to discuss the trainees’ lack of qualifications.

The record reflects only one specific instance where an FSM recommended that a trainee was not qualified, and that was because the trainee was afraid to walk on roof tops, which is required for the job. In this case, the general manager met with the trainee first before deciding to terminate the trainee. The trainee admitted to the general manager that he could not perform the required tasks because he was afraid to walk on roof tops. The record fails to reflect that the general manager relied solely on the recommendation of the FSM in deciding the trainee was not qualified.

The FSM's role in training and evaluating the trainees to determine if they are qualified to be "promoted" to technicians, does not constitute supervisory status. The ability to train employees is not one of the enumerated supervisory criteria set forth in Section 2(11) of the Act, and is not sufficient to confer supervisory status. See *Chrome Deposit Corp.*, 323 NLRB 961, 963-964 (1997). The Board has consistently held that training employees and determining their competency, or assessing an applicant's technical ability to perform the required work using pre-established standards or guidelines, does not constitute an effective recommendation to hire or promote, nor does it otherwise establish supervisory status. *Aardvark Post*, 331 NLRB 320, 321 (2000); *F.A. Bartlett Tree Expert Co., Inc.*, 325 NLRB 243 fn. 1 (1997); *Hogan Mfg.*, 305 NLRB 806 (1991). The fact that trainees will become eligible to earn bonus points toward an incentive bonus upon completion of the training does not make the FSMs' assessment of the trainees' qualifications a supervisory function. See *F.A. Bartlett Tree Expert Co., Inc.*, *supra*; *Elmhurst Extended Care Facilities*, 329 NLRB 535, 537 (1999); *Hogan Mfg.*, *supra* at 807. The fact that such assessment of trainees' skills is not a supervisory function is further supported by the fact that senior technicians frequently perform the same assessment. *Chrome Deposit Corp.*, *supra* at 964.

There is no evidence FSMs fill out evaluations other than the trainee checklist. One FSM testified he is sometimes asked by the general manager for his opinion of a technician, though he has never filled out an evaluation form. The record does not reflect the specific details surrounding these verbal evaluations. The ability to evaluate employees is not an enumerated function of Section 2(11) of the Act, and thus must be directly related to wages or job status. *Harborside Healthcare, Inc.*, *supra*. The authority to evaluate employees, without more, is insufficient to find supervisory status. *Ten Broeck Commons*, *supra*. Here, the record fails to reflect what, if any, impact the FSM's input had on the general manager's evaluation of the technician, or, more importantly,

whether these evaluations had any impact on the technician's wages or employment status.

G. Adjust Grievances

FSMs do not have the authority to adjust grievances. There is no record evidence that the Employer has a formal grievance procedure, or that the FSMs are involved in such a procedure. While the Employer presented evidence that FSMs could adjust the "grievances" of a customer, this is not the standard for determining supervisory status. Rather, the standard is whether the FSMs on their own authority can resolve disputes between employees or complaints about the Employer's treatment of the employee with respect to wages, work assignments, or other terms and conditions of employment. The examples of grievance adjustment given by the general manager, such as FSMs helping employees find their tools or helping them locate missing inventory, is not evidence of FSMs resolving disputes between employees or between employees and the Employer.

While the general manager testified the FSMs can recommend an adjustment be made over a technician's complaint about a "chargeback," where a technician is charged for damages caused by the installation, the record does not disclose any specific examples of such an adjustment being made as a result of an FSM's recommendation. Therefore, there is no evidence reflecting what weight, if any, would be given to the FSM's recommendation or what other factors may be relied upon by the individual making the ultimate decision on chargebacks. While one FSM testified that employees would call him with "concerns," the record contains no specific examples of such concerns or of the FSMs resolving any of these concerns. Technicians' complaints about paychecks or overtime must be deferred by FSMs to higher management, and there is no evidence of an FSM making a recommendation with respect to either paycheck or overtime issues, which decisions are made in Tulsa. As the Employer

presented no specific evidence of FSMs directing resolutions to any particular grievances, there is no specific evidence in support of the FSMs' authority to use independent judgment in adjusting grievances; and I cannot conclude that the FSMs possess the authority to adjust grievances. *Sears, Roebuck & Co.*, supra.

H. Secondary Indicia

The Employer presented evidence of secondary indicia, such as FSMs' attendance at management meetings, employee perception, and that FSMs have a desk, computer, and an office. While the Board has examined other secondary factors not set forth in Section 2(11) of the Act, these factors, without more, are insufficient to establish supervisory status. Thus, attendance at management meetings, employee perception, and having an office and a desk are, at most, secondary indicia which, in the absence of statutory indicia, are insufficient to establish supervisory status. *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Auto West Toyota*, 284 NLRB 659, 661 (1987). Further, with respect to the management meetings, while the general manager testified that "personnel" matters were discussed at these management meetings, the general manager did not provide any examples of particular "personnel" matters, nor does the record reflect the extent the FSMs' comments on such matters. Therefore, there is no evidence the FSMs exercised supervisory authority when attending these meetings. Also, while the record discloses the FSMs are salaried and not hourly like the technicians, the quality assurance specialists who are included in the unit are also salaried.

Finally, the record discloses that one FSM filled in for the assistant general manager for approximately a month when that manager was on sick leave. The record failed to disclose evidence that the FSM was given the assistant manager's authority while substituting for this manager. Even assuming this FSM did possess the assistant general manager's authority, the record disclosed the FSM did not substitute for the

assistant general manager on a regular and substantial basis so as to warrant excluding him from the unit on that basis. *Gaines Electric Co., Inc.*, 309 NLRB 1077, 1078 fn. 3 (1992); *Thermoid Co.*, 123 NLRB 57, 58-59 (1959).

I. Conclusion: FSMs Are Not Supervisors

The FSMs do not hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, or responsibly direct employees, or adjust their grievances, or effectively recommend such actions. Therefore, I find the Employer has not met its burden of proof to demonstrate the FSMs are statutory supervisors. Accordingly, the FSMs are appropriately included in the unit.

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.²
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

² The parties stipulated that the Employer, an Oklahoma corporation with its principal offices located in Tulsa, Oklahoma, and a facility located in St. Louis, Missouri, is engaged in the residential and commercial installation and service of satellite dishes. During the past 12 months, which period is representative of the Employer's operations, the Employer derived gross revenues in excess of \$50,000 from the performance of its services to customers located outside the State of Missouri and purchased and received at its St. Louis facility, goods and materials valued in excess of \$50,000 directly from points located outside the State of Missouri.

All full-time and regular part-time field service technicians/specialists, quality assurance specialists, and field service managers³ employed by the Employer at its St. Louis, Missouri facility, EXCLUDING office clerical and professional employees, guards, and supervisors⁴ as defined in the Act, and warehouse employees.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local One, International Brotherhood of Electrical Workers, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers, but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military service of the United States may vote if they appear in person at the polls.

³ As noted above, FSMs Jordan Dreeste and Ryan Hurtgen, who are discriminatees in an unfair labor practice charge, will be permitted to vote subject to the Board's challenge procedures.

⁴ The parties stipulated the following individuals are either supervisors under Section 2(11) of the Act, or managerial employees who formulate and effectuate management policies, and should be excluded from the unit: general manager, assistant general manager, office manager, and warehouse manager. Accordingly, and in agreement with the parties, I find that these individuals are appropriately excluded from the unit.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 1222 Spruce Street, Room 8.302, St. Louis, MO 63103, on or before **May 24, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (314) 539-7794 or by electronic mail at Region14@nrlb.gov. Since the list will be made available

to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or electronic mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m. EST on **May 31, 2005**. This request may not be filed by facsimile.

Dated: May 17, 2005
at: St. Louis, Missouri

/s/ [Ralph R. Tremain]
Ralph R. Tremain, Regional Director
National Labor Relations Board, Region 14

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